

*United States Court of Appeals
for the Second Circuit*



APPENDIX

Original w/affidavit of Mailing

75-2016

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-2016

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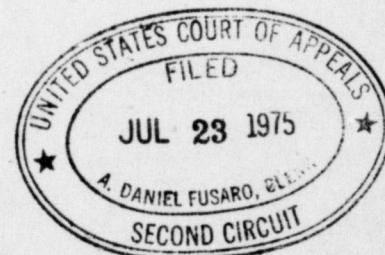
JOE L. JOHNSON,

Appellant,

-against-

UNITED STATES OF AMERICA,

Appe. 'ee.



ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

GOVERNMENT'S APPENDIX

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York

PAGINATION AS IN ORIGINAL COPY

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74C 1304

DOCKET

SEC. 2255

CLUESED

LEONARD, J.

~~1. A. 1~~

TITLE OF CASE

JOE L. JOHNSON

vs.

UNITED STATES OF AMERICA

ATTORNEYS

For Plaintiff: Joe L. Johnson
Pro Se

Pro Se

U.S. Penitentiary

P.M.B. 71274-158

Atlanta, Georgia 30315

For Defendant:

BASIS OF ACTION: PURSUANT TO SEC. 2255

(Related Case 70-CR-768)

JURY TRIAL CLAIMED

ON

ABSTRACT OF COSTS

TO WHOM DUE

AMOUNT

RECEIPTS, REMARKS, ETC.

94C 1304

JOE L. JOHNSON vs. UNITED STATES OF AMERICA

A-2

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
9-10-74	MOTION FILED TO VACATE SENTENCE (70-CR-768)	1 15
10-24-74	Government's Memorandum of Law filed.	2 15
10-25-74	Affidavit of BERNARD J. FRIED, Assistant U.S. Atty., filed in opposition, etc.	3
11-1-74	BY TRAVIA, J. Decision and Orser filed. ORDERED that the petitioner's application to set aside his judgment of conviction and sentence is DENIED. The Clerk of Court is directed to send a copy, etc., to petitioner. (See Decision)	4 15
11-4-74	Copy of letter of Clerk of Court filed dated Nov. 4, 1974 addressed to petitioner herein re enclosure of a copy of memo., etc.	5 15
12-6-74	PETITION FILED FOR A REHEARING, etc.	6
12-6-74	Motion for permission to proceed on appeal in forma pauperis, filed.	7
12-10-74	BY COSTANTINO, J. MEMORANDUM and ORDER FILED. Upon a review of Judge Travia's decision the application for a rehearing is DENIED. Leave to proceed on appeal in forma pauperis is granted. SO ORDERED. (See memo., etc.)	8
12-24-74	NOTICE OF APPEAL FILED.	9
12-24-74	Copy of "Notice of Appeal" was on this day mailed to Clerk, U.S. C.A., together with FORM C" <i>Amicus</i>	
12-24-74	Copy of "Notice of Appeal" was on this day mailed to U.S. Atty. <i>Amicus</i>	
1-15-75	All documents together with a certified copy of docket entries were on this day transmitted to Clerk, U.S.C.A. <i>Amicus</i>	
2-25-75	Copy of Index filed with the acknowledgment endorsed by Clerk, U.S.C.A. re documents received by that court.	10
3-6-75	Letter of Joe L. Johnson filed dated Feb. 21, 1975 together with a reply from Clerk of Court re record on appeal, etc.	11 & 12
5-19-75	Letter of petitioner herein filed dated May 12, 1975 requesting copies of certain documents, etc.	13

70CR 768

TRAVIA, J.

A.3

TITLE OF CASE		ATTORNEYS
THE UNITED STATES		CLOSED
vs. JOE L. JOHNSON		
<p>For Defendant:</p> <p>Kenneth Salaway 125-10 Queens Blvd. Forest Hills, NY. 793-2700</p>		
DID RECEIVE/CONCEAL/TRANSPORT NARCOTIC DRUG		

DATE	PROCEEDINGS
11/5/70	Indictment Filed. (Before Travia, J.)
NOV 19 1970	BEFORE TRAVIA, J., Case Called - Deft & counsel Mr. Salaway present. 1 Deft arraigned and enters a plea of not guilty. - 30 days for motions.
	Bail fixed at \$20,000.00.
11-19-70	Notice of Appearance filed. 2
7-6-71	Governments Notice of Readiness for Trial filed.
4-3-72	Before TRAVIA, J. - Case called. - Case adjourned to 4-28-72 at 10 A.M. for all purposes also motion to be filed.
4-28-72	Letter dated 4-24-72 from Kenneth W. Salaway filed.
4- [REDACTED] -72	Notice of motion for dismissal filed returnable 4-28-72.
4-28-72	Before TRAVIA, J. - Case called. Deft's motion to dismiss is denied. case adjourned to 6-30-72 at 10 A.M. to set trial date at Westbury, L.I.
	OVER

JOCK 300

DATE	PROCEEDINGS
6-30-72	Before TRAVIA, J. - Case called. Deft & counsel not present. Case adjourned to 9-5-72 for trial.
9-5-72	Before Travia J - Case called & adjd to Sept. 26, 1972 for Trial.
9-26-72	Before Travia J - Case called - case marked ready subject to 71 CR-1315.
10-4-72	Before TRAVIA J - Case called - Deft & counsel Kenneth Salaway present - Hearing on motion to suppress begun - Govt rests - Deft rests - Motion to suppress is denied with the right to renew - hearing concluded - Case adjd to Oct. 2, 1972 at 2:00 PM.
10-5-72	Before Travia J - Case called - deft & counsel present - case marked ready subject for Trial for Oct. 10, 1972.
10-10-72	Before TRAVIA, J. - Case called. Deft & counsel Kenneth Salaway present. Trial ordered and begun. The jury was selected & sworn in. Trial continued to October 11, 1972, at 10 A.M.
10-11-72	Before TRAVIA J - Case called - Deft & counsel present - Trial resumed - Defts motion for severance of count (7) etc. Motion denied - defts motion to exclude all evidence in apt. etc. Motion denied - Govt rests - defts motion to dismiss counts 1 to 6 are denied; defts motion to dismiss count 7 is denied with leave to renew - deft rests - defts moves for withdrawal of a juror etc. Motion denied - Both sides rest - defts motion for a Judgment of Acquittal - Motion denied - defts motion for dismissal of count 7 is denied - Govts motion to reopen case - Motion granted - Trial continued to Oct. 12, 1972 at 10:00 am.
10-12-72	Before TRAVIA J - Case called - Deft present with counsel - Trial resumed - Order of Sustenance signed - alternates Jurors discharged. Jury retires for deliberation - Jury came into court at 6:30 PM - court sent Jury home at 6:40 PM to resume deliberations on Oct. 13, 1972.
10-12-72	By Travia J - Order of Sustenance filed (Lunch - 15 persons)
10-13-72	Before Travia J - Case called - Deft & counsel present - Trial resumed. Jury resumes deliberations at 10:15 am. Order of Sustenance signed for lunch. Jury came into court at 5:25 PM and rendered a verdict of guilty on counts 1, 3, 4, 5 & 6 and not guilty on counts 2 and 7 - jury polled and Jury discharged - defts motion for a directed verdict of acquittal, etc. Motion denied - Govts motion to continue bail - motion granted - Trial concluded - Sentence adjd without date.
10-13-72	By Travia J - Order of Sustenance filed (13 persons Lunch)
12-11-72	Before Travia J - Case called - Deft & counsel Kenneth Salaway present. Deft sentenced to imprisonment for 15 years on count 1; 15 years on count 3 and 15 years on count 4; 15 years on count 6 and 10 years on

DATE	PROCEEDINGS
	on count 5 - sentences on counts 3, 4, 5 & 6 to run concurrently with sentence imposed on count 1 - deft advised of his right to appeal. Application for stay of execution of sentence and for bail pending appeal are denied.
12-11-72	Judgment and Commitment filed - certified copies to Marshal.
12-13-72	Certified copy of Judgment & Commitment returned & filed. Deft delivered to Federal Detention Headquarters.
12-14-72	Notice of Appeal filed
12-14-72	Docket entries and duplicate of Notice of Appeal mailed to the Court of Appeals.
12-19-72	Stenographers transcript dated Dec. 11, 1972 filed.
1/8/73	Stenographer's transcripts of Oct. 4, 1972, Oct. 10-13, 1972 and Oct. 30, 1972 filed.
1/10/73	Notice of Motion filed, ret. 1/26/73 re: requesting Order granting leave to the deft appellant in appeal in forma pauperis, etc.
1/22/73	Record on Appeal certified and mailed to the C. of A. (with a certified copy of docket entries).
1/26/73	Motion for an Order to appeal without funds, filed. Before TRAVIA, Case called-Marked off.
4/2/73	Stenographer's transcript of 4/28/72 filed.
5/1/73	Judgment recd from the C. of A. affirming the Judgment of this court filed (JOE JOHNSON)
5-14-73	Letter from deft Joe L. Johnson filed dated May 10, 1973, forwarded to Zavatt, J
5/17/73	Letter dated 5/10/73 filed from J. JOHNSON.
5/17/73	Letter dated 5/15/73 filed from J. TRAVIA, TO JOHNSON in response to JOHNSON's letter
7/31/73	<i>Letter from C. of A. received from C. of A. (Debt denied and denied)</i>
8-15-73	Letter no date received from chambers of Judge Travia filed as a motion for Reduction of Sentence.
9/19/73	By TRAVIA, J.- Decision and Order filed denying deft's motion for reduction of sentence- Copy mailed to deft

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A.6

UNITED STATES OF AMERICA,

Plaintiff

-against-

JOE L. JOHNSON,

Defendant

Indictment #70 CR 768

NOTICE OF MOTION
FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ APR 28 1972 ★

TIME A.M. _____

P.M. _____

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of Kenneth W. Salaway, sworn to the 21st day of April, 1972, and upon all the papers and proceedings had herein, an application will be made before the Honorable Anthony J. Travia in courtroom 6 in the Federal Court, located at Cadman Plaza, Brooklyn, N.Y. on the 28th day of April, 1972 at 10:00 in the forenoon of that day, or as soon thereafter as counsel can be heard for an Order dismissing the indictment herein for the Government's failure to afford the defendant herein a speedy trial under the provisions of the Sixth Amendment of the United States Constitution and the rules promulgated by the Second Circuit regarding prompt disposition of criminal cases promulgated January 5, 1971 and for such other and further relief as to the court may seem just and proper.

Dated: April 21, 1972
Queens, N.Y.

Yours, etc.,

KANE, SALAWAY & FINGER, ESQS.

Attorneys for Defendant

Office & P.O. Address

125-10 Queens Blvd.

Kew Gardens, N.Y. 11415

(212) 793-2700

TO:

ROBERT A. MORSE, ESQ.
U. S. Attorney
Cadman Plaza
Bklyn, N.Y. 11201

Attn: Peter Schlam, Esq.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A.7

UNITED STATES OF AMERICA,

Indictment # 70 CR 768

Plaintiff

-against

JOE L. JOHNSON,

Defendant

AFFIDAVIT

X

STATE OF NEW YORK)
)SS.:
COUNTY OF QUEENS)

KENNETH W. SALAWAY, being duly sworn, deposes and says:

That I am the attorney for the defendant herein and respectfully submit this affidavit in support of the within application for dismissal of the indictment for lack of prosecution.

The defendant herein was arrested on October 20, 1970 and charged with violation of Title 21 of the United States Code, Section 174. On November 19, 1970 the defendant was indicted on said charges at the United States District Court for the Eastern District of New York. (Attached hereto and marked Exhibit "A" is copy of said indictment).

Although motions were made to the indictment in December of 1970 and a reply was received from the U.S. Attorney in the month of January, 1971, no other action was taken by the Government in this matter until the case was placed on the calendar April 3, 1972.

That the defendant has now suffered a delay of approximately 18 months and his rights to a speedy and fair trial have been prejudiced by such delay. It is your deponent's belief upon a reading of the Second Circuit Rules regarding prompt disposition of criminal cases, the court should dismiss the charges against the defendant for the Government's failure to afford the defendant a speedy trial.

Under Section 4 of the Second Circuit Rules for the promulgation

of a speedy trial (copy of which is hereto attached and marked Exhibit B) the Government must be ready for trial within 6 months of the date of arrest of the defendant and upon failure of the Government to be ready within said 6 months, upon application of the defendant or upon motion of the court, the charge shall be dismissed. In the case at bar, the delay has been not a mere 6 months but a substantial period of time exceeding 6 months, to wit: 18 months. Although no application was made by defense counsel, the delay is so inherently damaging to the defendant that the spirit of the Rules require a dismissal by the court of said indictment. A.8

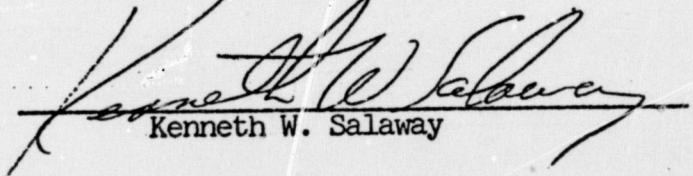
That your deponent supports his position that the defendant's rights have been prejudiced by his failure to receive a speedy trial through the authorities of Dickey v. Florida 398 U.S. 30, People vs. Marion—U.S.— 10 Cr.Law 3028. In both of these cases, the Supreme Court makes it quite clear that a delay after the defendant is either arrested or indicted of such duration as 18 months will bring upon a prejudice to the defendant's chances of a fair trial by impairing the ability of the accused to defend himself.

That in the case at bar, the defendant, Joe L. Johnson, has always indicated to your deponent that he was innocent of the charges set forth in the within indictment and that he would produce witnesses to testify on his behalf. Upon the Government's great delay in this matter, defendant verily believed that the Government would not proceed with this indictment. Learning that the Government some 18 months later after indictment have decided to move this case, defendant has had difficulty in locating the witnesses that would have testified on his behalf. But due to the fact that defendant has not ascertained with any degree of accuracy as yet if he will have these witnesses, defendant is not at this moment able to support his position. However, if the court wishes, the defendant will support his position of actual prejudice by affidavit.

Based upon the rules of the Second Circuit, the Supreme Court

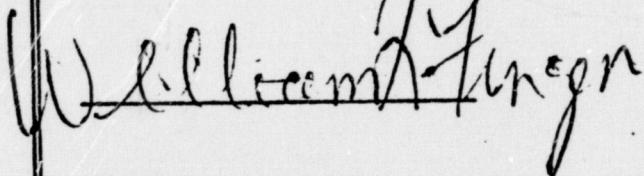
decisions and the great delay caused by the Government, it will enure to the defendant's detriment with regard to a fair trial in this action. It is your deponent's belief that the indictment should be dismissed by the court.

WHEREFOR, deponent respectfully requests that an order be entered dismissing the indictment and for such other and further relief as to this court may seem just and proper.



Kenneth W. Salaway

Sworn to before me this
21st day of April, 1972.



William L. Finger

WILLIAM L. FINGER
Notary Public, State of New York
No. 41-1215303 — Queens County
Term Expires March 30, 1969

13

2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

★ APR 2 1973 ★

4 -----x
5 UNITED STATES OF AMERICA

TIME A.M.
P.M.

6 -against- :
7 JOE L. JOHNSON, :
8 Defendant. :
9 -----x

70 CR 768

10
11 United States Courthouse
12 Brooklyn, New York

13 April 28, 1972
14 10:30 a.m.

15 Before:

16 HONORABLE ANTHONY J. TRAVIA, U.S.D.J.

17
18
19
20
21
22
23 PRINCETON KARRER that the foregoing is a
24 ACTING OFFICIAL ACCOUNTANT from my sten-
ographic notes in this proceeding.

25 Emanuel Karr

Official Court Reporter
U.S. District Court

1a

1
2 **Appearances:**3 **ROBERT A. MORSE, ESQ.**
4 United States Attorney
5 for the Eastern District of New York6 **BY: Peter R. SCHLAM, ESQ.**
7 Assistant United States Attorney8
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1
2 THE COURT: I have a letter here from
3 Kenneth W. Soloway, dated April 24, 1972,
4 which I assume you have a copy of.

5 MR. SCHLAM: I do not.

6 THE COURT: The letter does not indicate
7 he sent a copy to you, either. He enclosed
8 in that letter, which by the way I received
9 last night when I visited my Westbury chambers,
10 which means it was delivered by mail yesterday
11 at that courthouse and was sent to me at this
12 court and I suppose in forwarding there was a
13 delay in the delivery and that is why I probably
14 received it yesterday, but anyway he encloses
15 with that letter a notice of motion returnable
16 today. Do you have that motion?

17 MR. SCHLAM: Yes, motion to dismiss.

18 THE COURT: What piques me a little bit
19 is that he says, "I expect to be on trial. He
20 is presently on trial in the Southern District
21 in U. S. against Bynum and he says he will be
22 on trial for at least another two weeks.

23 He encloses this motion and goes on to
24 say: "I apologize for delaying making this motion
25 but I have been on trial," et cetera, and he

1
2 requests respectfully the Court accept the motion
3 as submitted. In other words, he is running
4 this court as to how motion practice is going
5 to be handled, who sets the time, who sets the
6 dates and what should be done with regard to
7 his motion. That is one thing.

8 Secondly, he says if the Court should deny
9 his motion and trial date be set down, it be set
10 down for sometime in September. He complains
11 about the delay but now he asks if I could set
12 it down sometime in September, "Due to my trial
13 schedule in the Federal and State Courts." And
14 then he goes on to say he is ready and passed in
15 the Brooklyn Supreme Court in a homicide case
16 and two cases relating to possession of dangerous
17 drugs, and so forth and says further, "I do not
18 believe these cases will be completed much before
19 the latter part of June."

20 I do not know who is delaying here or
21 what but I am going to ask this letter be marked
22 and made part of this file so that the letter
23 speaks for itself on the question of the motion,
24 since you have had notice of it and you have
25 a copy of it.

1
2 I have no objection to handling it right
3 now without him because he says he wishes to
4 submit it and I have already read from his
5 letter.

6 What have you to say about that motion?

7 MR. SCHLAM: Your Honor, first of all
8 the Government filed a notice of readiness.

9 THE COURT: I do not care about those
10 notices, they do not mean anything.

11 MR. SCHLAM: We are ready to go to trial.

12 THE COURT: According to him the defendant
13 was arrested in 1970.

14 MR. SCHLAM: He was arrested in 1970 and
15 he was indicted in 1970.

16 THE COURT: And I believe it was November
17 or December.

18 MR. SCHLAM: November 5, 1970. He was
19 arrested in October 1970 and he was indicted
20 within a month of his arrest.

21 THE COURT: What is the reason for the
22 delay from November of 1970 or January of 1971
23 to now, April of 1972.

24 MR. SCHLAM: Your Honor, the Government
25 has been ready all along, we have been ready to

1

6

2

go to trial.

3

THE COURT: Have you been?

4

MR. SCHLAM: Yes, your Honor, absolutely.

5

THE COURT: For how long has this case
been assigned to me?

7

MR. SCHLAM: I assume, sir, it was
assigned to you approximately the time of his
pleading.

10

THE COURT: Which was sometime in January
1971?

12

MR. SCHLAM: Right.

13

THE COURT: And I know of no pressure
being put on me by either side to try this case.

15

MR. SCHLAM: Your Honor, as soon as
your Honor is ready to try the case we are ready
to try the case. It is a sale to an undercover
agent and I do not think the case will take
more than two days on trial.

20

THE COURT: When did you file a notice
of readiness?

22

MR. SCHLAM: The notice of readiness I
have in my file is not dated.

24

THE COURT: It was filed in this Court's
clerk's office September 3rd, nine months later.

A.16

2 MR. SCHLAM: He made a motion for a bill
3 of particulars, et cetera, which we answered on
4 February 3, 1971.

5 THE COURT: We are talking about nine
6 months ago. Have you anything further to say,
7 Mr. Schlam?

8 MR. SCHLAM: No, sir.

9 THE COURT: I have read the affidavit of
10 Mr. Soloway very carefully and it does not in-
11 dicate to me that there is any real basis for
12 granting his motion to dismiss and I might refer
to his letter which indicates he does not expect

14 I will do that, because he asks that we set a
15 date down sometime in September so that he is
16 now causing a much fur'her delay, he is prolong-
17 ing the delay, so his motion to dismiss is denied.
18 You can inform him of that. He claims he is
19 going to be on trial at least to the end of
20 June.

21 MR. SCHLAM: Your Honor, I am wondering,
22 consistent with the Court's schedule, if we can
23 set a trial date if he wants a trial in September,
24 if we can set a date now.

THE COURT: What is the last Friday in

1
2 June? That is when he is coming before me in
3 Westbury and he says he will be finished by the
4 latter part of June. If he is finished by then,
5 we will go to trial then.

6 CLERK OF THE COURT: The last Friday in
7 June is June 30.

8 THE COURT: June 30 to set a firm trial
9 date within days thereafter in Westbury, Mr. Schlam.

10 Would you also file with the motion papers
11 this letter of Mr. Soloway so that they will be
12 in the file together.

13 *****

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1
2 UNITED STATES DISTRICT COURT

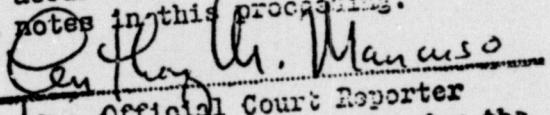
3 EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT, N.Y.

7 JAN 8

4 -----x
5 UNITED STATES OF AMERICA, :
6 -against- :
7 JOE L. JOHNSON, :
8 Defendant. :
9 -----xTIME AM
P.M.

70-CR-768

10
11 United States Courthouse
Westbury, New York12 October 10, 1972
13 10:00 o'clock A.M.14 Before :
1516 HONORABLE ANTHONY J. TRAVIA, U.S.D.J.
1718 I certify that the foregoing is a
19 and accurate transcript from my stan-
20 phic notes in this proceeding.
21
22 Anthony J. Mancuso
23 Official Court Reporter
24 U.S. District Court for the
25 Eastern District of N.Y.23
24 ANTHONY MANCUSO
25 ACTING OFFICIAL COURT REPORTER

7.

1 | McMillan - direct

19

2 A 12 years, sir.

3 Q And are you presently assigned to the New York
4 Joint Task Force?

5 A I am, sir.

Q And were you assigned in August, of 1970?

7 A That's correct, sir.

8 Q Now, Agent McMillan, I direct your attention
9 to August 4, 1970. Did you in connection with your
10 official duties, meet with an informant and other agents of
11 the New York Joint Task Force?

12 A That's correct, sir.

13 O And at about what time did this meeting take
14 place?

A : About 8:30 P.M., sir.

Q What was the location of this meeting?

17 A That was at Washington Street and Park Avenue in
18 Brooklyn, New York.

19 Q And at this meeting, what occurred with respect
to the informant?

A The informant was searched by Detective Robert Evans

8. Did you personally observe that search?

A. I did, sir.

8 And what was the purpose of the search?

A To see whether or not the informant had any drugs on

A.20

McMillan - direct

20

2 his person.

3 Q And do you know what the results of the
4 search was?

S A The result of the search was negative.

Now, Agent McMillan, after this meeting --

7 THE COURT: You mean by that, that he didn't
8 have any drugs on him?

9 THE WITNESS: That he didn't have any
10 drugs.

11 Q Now, Agent McMillan, after this meeting,
12 what occurred with respect to you and the informant?

13 A The informant and I, in a Government vehicle, went
14 to No. 227 Hancock Street, Brooklyn.

15 Q What occurred when you got to 227 Hancock
16 Street, Brooklyn?

17 A We went to the second floor and knocked upon the door.

18 Q What type of building is located at 227 Hancock
19 Street?

A It's a tenement house, sir.

Q And you testified you went to the second floor?

— A That's correct, sir.

23 Q And what occurred when you got to the second
floor?

A We knocked on the door, sir.

1 | McMillan - direct

21

2 O Do you recall what door you knocked on?

3 A It was the door to the right of the stairs as we went
4 up, sir.

Q What occurred after you knocked on the door?

6 A Joe Louis Johnson opened the door and we went inside,
7 sir.

8 Q Do you see the individual that opened the
9 door in the courtroom?

10 A Yes.

Q Would you point him out to the jury?

12 A He's over there, sir.

13 MR. SALAWAY: This gentleman here?

14 THE WITNESS: That's correct, sir.

15 MR. SALA

16 Joe L. Johnson.

17 Q Now, Agent McMillan, what happened after the

18 defendant opened the door?

19 A We went inside, sir, and Joe Louis Johnson gave me a
20 bag with white powder and I, in turn, gave him \$1600 of
21 official funds.

22 Q Did you have any conversation with him?

23 A Yes, sir.

24 Q What was that conversation?

A He told me that the white powder could be hit 7 times.

McMillan - direct

Q What was your understanding by the fact that
the white powder could be hit 7 times?

A It means, sir, that by diluting the white powder you could put 7 times the amount of heroin on the street.

Q Now, before he gave you the white powder, --
strike that.

Where did you get the money from that you paid him for the white powder?

A I went downstairs to my car in the street and got the money and came back up to the apartment.

Q. And what occurred?

THE COURT: Where was the money, in the car?

THE WITNESS: That's correct.

THE COURT: Or, in the possession of
somebody?

THE WITNESS: That's correct, your Honor.

THE COURT: Where did you have it?

THE WITNESS: In the trunk of the car.

THE COURT: Where had you gotten that
money, prior to that?

THE WITNESS: That was official money.

THE COURT: That's all I wanted to know.

2 A No, sir.

3 Q At the time the defendant gave you the white
4 powder, did you give him a blank purchase order form?

5 A I did not, sir.

6 Q Now, what occurred after you left the
7 apartment?

8 A I returned to the pre-arranged spot at Washington
9 Street and Park Avenue.

10 Q And at that time, what did you have with you?

11 A I had exhibit 1.

12 THE COURT: No, you didn't.

13 Q And what is exhibit 1?

14 THE COURT: No, exhibit 1 is an envelope.

15 A I had the powder, sir, that I purchased from Joe
16 Louis Johnson.

17 Q When you got to the meeting place, what
18 occurred there?

19 A I gave the white powder to Sergeant Moriarity of
20 the Task Force.

21 Q Did you see what he did with it?

22 A Yes, sir.

23 Q What did he do with it?

24 A He made a field test of the white powder.

25 THE COURT: In your presence?

McMillan - direct

30

THE WITNESS: That's correct, your Honor.

THE COURT: Okay,

4 Q Did you see what the results of the field test
5 were?

6 A I did, sir.

8 What were the results of the field test?

8 A It was a positive test, sir.

Q What occurred after that?

10 THE COURT: Tell us what a positive test
11 is.

12 Q Would you explain to the jury and to the
13 Court what a positive reaction, in a field test is?

14 A Yes, sir. A positive test is whereby you take an
15 acid that is provided by the Government and this, as I said,
16 is put on a sample of the substance and if that gives a
17 certain color, it indicates that it has a derivative of
18 heroin in it.

19 Q And what color indicates that something has a
20 derivative of heroin?

A Purple, sir.

22 Q And what color was obtained when a sample of
23 that white powder was field tested?

A Purple, sir.

Q After the field test was conducted, what happened

McMillan - direct

37

2 were together, would you want to get your proof
3 in with respect to 1A or do you want to wait
4 for the others?

5 All right, leave them alone. Otherwise
6 we're going to have to bring in somebody else
7 and disrupt --

8 MR. SALAWAY: Subject to cross examination
9 and to connection, your Honor, the defendant has
10 no objection at this time.

11 THE COURT: Okay.

12 Government's exhibit 1 in evidence is
13 received, subject to cross examination and further
14 connection.

15 MR. SALAWAY: Thank you, your Honor.

16 THE CLERK: Government's exhibit 1
17 received in evidence.

18 (So marked.)

19 Q Now, Agent McMillan, I direct your attention
20 to August 11, 1970. On that date did you place a telephone
21 call to the defendant?

22 MR. SALAWAY: Object to the leading.

23 Q Agent McMillan, what happened on August 11,
24 1970?

25 A I placed a call to the residence of Joe Louis Johnson

McMillan - direct

38

2 Q Now, at the time that you placed this call,
3 were you familiar with the defendant's voice?

4 A I was.

5 Q And how did you become familiar with the
6 defendant's voice?

7 A On August 4th, I had made a purchase of narcotics
8 from him.

Q And on August 11, 1970, what occurred?

10 THE COURT: On August 4th when you made
11 a purchase from him, that didn't elicit any
12 conversation, just a purchase?

13 THE WITNESS: It did, your Honor.

14 THE COURT: You mean there was a con-
15 versation at that time?

THE WITNESS: That's correct, your Honor.

17 THE COURT: Well, will you get into a
18 little more how he knows it's the same?

19 MR. WARBURGH: I'm trying not to lead the
20 witness.

21 THE COURT: No. I don't want you to. But
22 you can ask the question.

23 Q On August 4, did you have a conversation with
24 *Q* the defendant?

A I did, sir.

McMillan - direct

39

2 Q And how long was the conversation that you
3 had with him?

A Approximately 5 or 10 minutes, sir.

5 THE COURT: That's the occasion that
6 you made that purchase?

7 THE WITNESS: That's correct, your
8 Honor.

9 Q Now, at the time on August 11, 1970, when
10 you placed this phone call to the defendant, was the
11 phone answered?

12 A Yes, sir.

13 Q And did you recognize the voice that answered
14 the phone?

A : I did, sir.

Q And whose voice was it?

A Joe Louis Johnson, sir.

18 Q Now, would you tell the jury and the Court
19 what was said to you by the defendant and what was said to
the defendant?

21 A I asked the defendant would I be able to get some
more of the stuff that I had gotten on the night of August 4.

Q What do you mean by the word, "stuff"?

A Heroin, sir.

Q What did the defendant say to you?

1 | McMillan - direct

40

2 A He said, "Yes."

3 Q Was there any further conversation?

4 A Yes, sir.

5 Q What was that?

6 A I told him I would call on the following day, to let
7 him know exactly what time I would be able to come and pick
8 it up.

On the next day, what day was that?

10 A That was the 12th, sir.

11 Q And what occurred on August 12, 1970?

12 A I made another call to Joe Louis Johnson, sir.

At about what time was this call made?

14 A That was about 3 P.M., sir.

Q. And did you speak to the defendant?

115 A I did, sir.

17 Q And what -- did you have a conversation with
18 him?

18 A I did, sir.

20 Q Would you tell the jury what that conversation
21 was?

22 A Yes, sir.

23 I told him that I would be around approximately 8:30
24 to pick up the package.

25 Q What did the defendant say when you said that

to him?

A He said, "Okay."

Q Now, Agent McMillan, later on that day, on August 12, 1970, what occurred?

A We again met at Park Avenue and Washington Street.

Q By referring to "we," who do you mean?

A Officers of the New York Task Force and myself.

THE COURT: How many and who?

THE WITNESS: There was several officers, Supervisor Holborow, Detective Ryan and Viscarelli and Gorgetti and other officers, sir.

THE COURT: Okay.

Q Now, what occurred at this meeting?

A At the meeting I -- after the meeting I got into my car and I went to 227 Hancock Street.

Q Now, at this time, was anybody accompanying you in your vehicle?

A No, sir. I was alone.

Q What did you do when you got to 227 Hancock Street?

A I went to the second floor, sir.

Q About what time did you arrive there?

A Approximately 8:30.

Q What did you do when you got to the second

McMillan - direct

42

2 floor?

3 A I knocked upon the door that I was at previously and
4 waited for a few seconds. Thereupon, a male Negro opened
5 the door of the apartment on the opposite side of the hall.

2 Did you recognize this male Negro?

7 A No, sir.

8 Q What occurred when this male Negro opened
9 the door?

A He asked me who I was looking for.

11 MR. SALAWAY: I object. If we're not
12 speaking of this defendant, I would object to
13 any conversation.

14 THE COURT: We're not getting to any
15 conversation yet. He's just asking who it was.

16 Q Did you have a conversation with the male
17 Negro?

10 A Yes, sir.

Q As a result of this conversation, what happened?

A. He told me --

THE COURT: Don't tell us what he told you.

MR. SALAWAY: Objection.

MR. GOURD: What did you do?

23 THE WITNESS: I went into the apart
24
25 where the male Negro had opened the door.

2 Q What occurred when you went into the apartment?

3 A I went into the front of the apartment to a bedroom.

4 Q What did you observe in the bedroom?

5 A Joe Louis Johnson sitting on a bed.

6 Q What was he doing while he was sitting on the
7 bed?

8 A He was counting money.

9 Q Did you have a conversation with the defendant
10 at that time?

11 A Yes, sir.

12 Q What was that conversation?

13 A I said that I came to get the package.

14 Q What did he reply?

15 A He told me the package was ready. He gave me the
16 package and I in turn gave him \$1500 of official money.

17 Q And where had you gotten the \$1500 of official
18 money?

19 A I had received the official money from the office
20 from Supervisor Holborow.

21 Q And when had you received that money?

22 A Prior to my coming to this address.

23 Q Now, would you explain to the jury what
24 occurred with respect to the money and with respect to this
25 package?

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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2.25% INVESTMENT TAX.

JAN 3

UNITED STATES OF AMERICA

THEATRE

-against-

1

JOE L. JOHNSON

70-CR-768

Defendant.

Before

HONORABLE ANTHONY J. TRAVIA

U. S. P. N.

...eby certify that the foregoing is a
and accurate transcript from my stenographic notes in this proceeding.

Official Court Reporter
U.S. District Court for the
Eastern District of N.Y.

ANTHONY MANCUSO
Acting Official Court Reporter

8

1
2 **Appearances:**

3

4 **ROBERT A. MORSE, ESQ.**
5 **United States Attorney for the**
6 **Eastern District of New York**

5

6

BY: PAUL WARBURGH, ESQ.
Assistant U.S. Attorney

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KENNETH SALAWAY, ESQ.
Attorney for the Defendant

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1
2 THE CLERK: Criminal cause on trial,
3 U.S.A. versus Joe L. Johnson.

4 (Jury in the box.)

5 THE COURT: O.K., Mr. Warburgh, will
6 you call your next witness.

7 MR. WARBURGH: Yes, your Honor. The
8 government at this time will call Patrolman
9 Julius Georgetti.

10
11 J U L I U S J. G E O R G E T T I, was duly
12 sworn by the Clerk of the Court.

13 THE CLERK: State and spell your name
14 for the court reporter, please.

15 THE WITNESS: Julius J. Georgetti,
16 G-e-o-r-g-e-t-t-i. .

17 THE CLERK: And your business address?

18 THE WITNESS: 201 Varick Street, New
19 York, New York.

20 DIRECT EXAMINATION

21 BY MR. WARBURGH:

22 Q Patrolman Georgetti, will you tell the Court
23 and jury what your occupation is?

24 A I'm a New York City detective, in the field of
25 narcotics.

Georgetti - direct

83

2 Q And in 1970 were you assigned to the New
3 York Joint Task Force?

4 A Yes, I was.

5 Q And in connection with your official duties
6 on August 4, 1970, did you meet with Agent McMillan and
7 other members of the New York Joint Task Force?

8 A Yes, sir, I did.

9 Q And where did this meeting take place?

10 A At Park Avenue and Washington Avenue in Brooklyn.

13 A Yes. We met approximately 8:30 p.m. We met
14 McMillan and S. E. P. 0020.

15 Q What do you mean by S.E.P. 0020?

16 A cooperating individual who was going to introduce
17 the agent to a man selling narcotics.

18 THE COURT: An informant?

19 THE WITNESS: An informant, right.

At this meeting Detective Ryan searched the

21 S.E.P. for any contraband. The search became

22 negative. After a short talk of what was going
23 to happen during the course of the evening.

24 myself. Investigator Visciarelli and Detective

25 | Ryan proceeded to 227 Hancock Street and placed

1 Georgetti - direct

2 this building under observation.

3 Q What did you observe after you got there?

4 A It was a residential area, as far as that was
5 concerned, and approximately 9:00 o'clock Agent McMillan
6 and the S.E.P. arrived in an OGV.

7 Q What do you mean by an OGV?

8 A Government operated vehicle.

12 Agent McMillan exited the building and
13 returned to his CGV and opened the trunk.

At this time he was supposed to tell us --

15 MR. SALAWAY: Objection as to what he
16 was supposed to tell us.

17 THE COURT: Was that a signal?

18 THE WITNESS: Yes. It was a signal to
19 tell us --

20 MR. SALAWAY: Objection.

Q. He opened the trunk and that was a signal?

22 A Yes

22 0 What happened then?

24 A McMillan closed the trunk and proceeded back to the
25 residence.

1

Georgetti - direct

2

Q Did you observe whether he took anything
3 out of the trunk?

4

A I couldn't see that. Approximately I think it was
5 about 9:18. To be exact, McMillan and the S.E.P. exited
6 the building, returned to the OGV and drove away.

7

Q What did you do then?

8

A At that point I radioed to Sergeant Moriarity and
9 S.A. Harboro, who took up immediate surveillance and met --

10

MR. SALAWAY: Objection.

11

THE COURT: Only what you saw. You
12 radioed them of the fact that they had left?

13

THE WITNESS: Right.

14

THE COURT: O.K.

15

Q What did you do then?

16

A I remained in the area, awaiting the radio message
17 return, whether the man had purchased narcotics or not.

18

At this time over the radio they did tell
19 us they made a purchase.

20

MR. SALAWAY: Objection.

21

THE COURT: We don't know who. Hearsay.

22

Tell us what you did. In other words,
23 you waited there?

24

THE WITNESS: Yes, sir.

25

THE COURT: The car left, McMillan left?

1 Georgetti - direct

86

2 THE WITNESS: Right.

3 THE COURT: And you radioed ahead to
4 Harboro?

5 THE WITNESS: And Sergeant Moriarity.

6 THE COURT: And then they radioed back
7 to you?

8 THE WITNESS: Right.

9 THE COURT: They had radioed back to you
10 and you at that point you went someplace; right?

11 THE WITNESS: I stayed in the area, and
12 then we left.

13 THE COURT: You stayed in the area?

14 THE WITNESS: We stayed in the area
15 maybe fifteen minutes or so, and we proceeded
16 back to the Task Force office, which is at
17 201 Varick Street, New York, New York.

18 BY MR. WARBURGH:

19 Q What did you do when you got back to the
20 office?

21 A I met Agent McMillan and other surveilling units.
22 At this location McMillan turned over Exhibit 1 to
23 Investigator --

24 Q What did he turn over to you?

25 A A white powdered substance that was in a plastic bag.

1 Georgetti - direct

2 Q All right. You have before you some
3 manila envelopes. Would you look at the envelopes marked
4 Government's Exhibit 1 and 1A.

5 THE COURT: Open it. .

6 MR. WARBURGH: I think they are already
7 opened.

Q. You removed that from which envelope?

9 A Exhibit 1.

10 Q You removed from Exhibit 1 --

11 A The glassine bag and the white powder.

Q And can you recognize that plastic bag?

13 A res. I have my initials on the bag, and the date
14 and the time I initialed it.

15 Q Where was the first time you saw that?

16 A At the Task Force office.

17 Q And did you receive that plastic bag from
18 anybody?

19 A McMillan had turned over this exhibit to Investigator
20 Visciarelli.

21 MR. SALAWAY: Objection, unless we know
22 if it was in his presence, your Honor.

23 Q Did you personally observe this?

24 A I observed this.

25 MR. SALAWAY: Withdraw the objection.

Georgetti - direct

2 THE WITNESS: And at that time

3 Investigator Visciarelli weighed the exhibit
4 and sealed it in my presence.

5 Q When did you put your initials on it?

6 A Prior to the sealing.

7 Q What happened then with respect to the
8 plastic bag with the white powder in it?

9 A Investigator Visciarelli and myself then took the
10 exhibit, which was in an envelope at the time, and we
11 brought it to 90 Church Street and placed it in the BNDD
12 vault overnight.

13 Q Before you placed the plastic bag with the
14 white powder in the envelope, did you write on the
15 envelope?

16 A At the time, no, I didn't.

17 Q Did you see anybody else write on the
18 envelope?

49 A Yes. Investigator Visciarelli was writing on the
50 envelope.

21 Q Now, did you see what Investigator Visciarelli
22 did after he had written on the envelope?

23 A He sealed it.

24 Q He sealed the envelope and what happened
25 then?

1 Georgetti - direct

2 A He initialed it in the back, in the back of the
3 envelope.

4 Q Did your initials appear on the back?

5 A My signature is on the back. We sealed it.

6 I initialed it and witnessed it, and after which we brought
7 it to 90 Church Street.

8 Q When did you take it to 90 Church Street?

9 A That evening.

10 Q What did you do with it when you got to
11 90 Church Street?

12 A We deposited it in the Task Force -- BNDD vault
13 overnight.

14 Q What happened after that?

15 A The next day I picked it up and brought it to the
16 United States chemist, which is in the same building.

17 Q Do you recall who you delivered the envelope
18 to?

19. A No, I don't.

20 Q Was it somebody assigned to the chemical
21 laboratory?

22 A There is a man that comes out. It's a locked door.
23 A girl comes out, secretary, and one of the chemists
24 comes out. He initials it and at that time you turn it
25 over to the chemist, who signs for it.

Georgetti - direct

2 Q Now I direct your attention to August 12,
3 1970. On that day were you working with the New York
4 Joint Task Force?

5 A Yes, I was.

6 Q Will you explain to the jury what occurred
7 on that day?

8 A On that day myself, Detective Ryan, Sergeant
9 Costles and Agent Harboro proceeded to the vicinity of
10 227 Hancock Street.

11 Q Prior to this, prior to proceeding to 227
12 Hancock Street, did you meet anywhere?

13 A Yes, we met at the Task Force office.

Q. Who was there at the Task Force office?

15 A The four people I mentioned, including myself
16 and S.A. McMillen.

Q. What occurred when you were there?

18 A At this location we made negotiations -- we talked
19 about --

MR. SALAWAY: Objection.

21 THE COURT: Don't say what you talked
22 about. You met.

22 THE WITNESS: We met and discussed --

THE COURT: And then --

THE WITNESS: We went out.

1 Georgetti - direct 12

2 THE COURT: Tell us what you did.

3 Q What did you do at the office?

4 A We discussed the purchase -- the purchase of

5 Exhibit --

6 MR. SALAWAY: Objection.

7 THE COURT: I'll sustain the objection.

8 Q After this meeting, what happened?

9 A We went out to 227 Hancock Street and myself and
10 Agent Harboro remained in the area to observe the
11 building of 227 Hancock Street.

12 Sergeant Costles and Detective Ryan went
13 to another location.

14 At approximately 8:30 we did arrive at that
15 location.

16 Shortly after that Agent McMillan drove
17 up in his OGV, Government operated vehicle, exited the
18 vehicle and entered 227 Hancock Street.

19 Approximately 9:15 he existed 227 Hancock
20 Street, re-entered his OGV and he drove away.

21 Myself and Agent Harboro at that time
22 did follow S.A. McMillan. We followed him to approximately
23 Hooper Street and Lee Avenue. At that time Agent McMillan
24 showed me a white powder contained in the plastic bag
25 which he said he had purchased.

1 Georgetti - direct

1 92

2 MR. SALAWAY: Objection.

3 Q Just tell the Court and jury what you did

4 and what you observed.

5 A He showed me a plastic bag containing white powder.

6 At that location I took some powder out and field-tested

7 it. It came out to be a positive reaction, which means

8 there's a controlled substance in the powder.

9 McMillan then proceeded --

10 Q When you were referring to this field test
11 and said it had a positive reaction, what do you mean
12 by that?13 A Well, it is a chemical reaction in which, if there's
14 a controlled substance present it would turn a red color,
15 say.

16 Q Did this substance turn a color?

17 A Yes.

18 Q What color did it turn?

19 A Red.

20 Q What did that indicate to you?

21 A That there was a controlled substance present.

22 Q What do you mean by a "controlled substance"?

23 A Possibility of heroin.

24 Q What happened after that?

25 A McMillan re-entered his OGV and we followed him back

1 Georgetti - direct

2 Agent Harboro and myself followed him back to the Task
3 Force office.

4 Q What happened when you got back to the Task
5 Force office?

6 A At that location Detective Ryan and Sergeant
7 Costles were already there and McMillan had turned over
8 Exhibit 2, which is that glassine bag with the white
9 powder to myself.

10 Q Now you have before you two other envelopes
11 marked Government's Exhibits 2 and 2A. Now you removed
12 from which envelope --

13 || *Wuhuhi + 2*

Q -- a plastic bag with white powder in?

15 A Right.

16 Q Are you able to recognize that?

17 A This is the plastic bag and I have my initials
18 on it. And also, after I weighed and sealed it and then
19 Detective Ryan was present at the time, I put it in the
20 envelope and signed it and Detective Ryan had witnessed it.

21 Q And you're referring to Government's
22 Exhibit 2; is that correct?

23 A Right.

24 Q It's your testimony that the contents of
25 Government's Exhibit 2, plastic bag with the white powder,

Georgetti - direct

2 has your initials or it?

3 A Yes, they do.

4 Q Whom did you receive that from?

5 A Agent McMillan.

6 THE COURT: Are his initials on it, too?

7 THE WITNESS: Yes, they are.

8 Q Now, after you completed weighing the con-
9 tents of the envelope, initialing it and sealing it in
10 the envelope, what did you do then?

11 A I proceeded to 90 Church Street and deposited this
12 in the BNDD vault overnight.

13 Q Was this on the same day?

14 A Yes, it was.

15 Q What occurred after that?

16 A The next day I went back to 90 Church Street,
17 picked up the evidence, and again I brought it to the
18 United States chemist, which is in the same building, and
19 turned it over to a chemist at that location.

20 Q Can you describe specifically what happened
21 . when you turned it over to the chemist?

22 A The chemist signed the BNDD 7, which is a voucher
23 saying "We received your evidence," and I left.

24 Q Who was in charge of the investigation
25 concerning this defendant?

1

Georgetti - direct

2

A Both Detective Ryan and myself. We were partners
3 and we handled any investigation that came up at the time.

4

Q Who was the one that would make any decisions

5 concerning this case?

6

A We had an equal role. It made no difference.

7

MR. WARBURGH: I have no further questions

8 your Honor.

9

MR. SALAWAY: I have no questions.

10

THE COURT: No questions?

11

MR. SALAWAY: No questions.

12

THE COURT: Mr. Georgetti, please sit

13

down, back on the stand. I meant sit down

14

there a minute.

15

You say you field-tested the second
16 plastic bag that you received from McMillan
17 on the 12th?

18

THE WITNESS: Yes, I did.

19

THE COURT: You didn't field-test the
20 first?

21

THE WITNESS: No, I didn't.

22

THE COURT: In fact, you went from the
23 place where you had radioed and advanced right
24 to Varick Street where you met McMillan?

25

THE WITNESS: Yes, your Honor.

95

A.47

1 Georgetti - direct 17

2 THE COURT: Now, when you field-tested
3 the white powder, tell me what you did.

4 THE WITNESS: We have a marquis agent.
5 It's supposed to be about this big in size, and
6 break it open and put it over the bag -- the
7 heroin, we'll say -- and take a little scoop
8 of it and drop it in this little vial, at
9 which time, if there's a chemical reaction
10 it would turn red.

11 THE COURT: Red or any other color?

12 THE WITNESS: Red or any other color.

13 THE COURT: In this case it turned red?

14 THE WITNESS: Yes.

15 THE COURT: What would happen if a purple
16 color turned up?

17 THE WITNESS: I have no idea.

18 THE COURT: Do you know of any turning
19 purple?

20 THE WITNESS: There may be.

21 MR. SALAWAY: One question, your Honor.

22 CROSS EXAMINATION

23 BY MR. SALAWAY:

24 Q But, in this instance, when you saw this
25 color change, you saw it to be red, not purple; is that

1

Georgetti - cross

2

correct?

3

A Yes, deep red color.

4

Q Was it red or purple?

5

THE COURT: When you say "deep red" --

6

THE WITNESS: You can say burgunday --

7

is it red?

8

Q So now your recollection being refreshed,
are you now saying it might have been purple?

9

A I would say burgundy red, you know.

10

MR. SALAWAY: No other questions.

11

MR. WARBURGH: No other questions,

12

your Honor.

13

THE COURT: O.K., step down, Mr.

14

Georgetti.

15

MR. WARBURGH: Your Honor, may we
approach the bench before I call the next witness?

16

THE COURT: Sure.

17

(The following occurred at side bar.)

18

THE COURT: What's the problem?

19

MR. WARBURGH: The Government intends to
call now Investigator Visciarelli and we intend
to go into the discovery of the bag containing
the heroin and some other articles.

20

MR. SALARY: Then I would ask at this

97

A4

2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF NEW YORK

5 UNITED STATES OF AMERICA :
6 -against- :
7 JOE L. JOHNSON, :
8 Defendant. :

FILED
IN CLERK'S OFFICE
DISTRICT COURT OF APPEALS

JAR 3

October 13, 1972
10:00 a.m.

15 Before

HONORABLE ANTHONY J. TRAVIA
U. S. D. J.

I hereby certify that the foregoing is a
true and accurate transcript from my sten-
graphic notes in this proceeding.

George M. Marcus
Official Court Reporter
U.S. District Court for the
Eastern District of N.Y.

ANTHONY MANCUSO
Acting Official Court Reporter

109 A.52

1
2 THE COURT: Now, on Johnson. Mr. Warburgh
3 and Mr. Salaway, the jury is all together.

4 MR. SALAWAY: Yes, sir.

5 THE COURT: I would like to tell them that
6 they can now continue their deliberations, but
7 rather than having them all come out here, suppos-
8 int the three of us go in there and tell them.

9 MR. SALAWAY: Fine, sir.

10 (In the jury room.)

11 THE COURT: Okay. Are all the twelve of
12 you here?

13 Then, continue with your deliberations from
14 now and the usual goes. If you need anything,
15 you just rap at the door and send a note and I
16 will take care of you. Okay, you may continue.

17 (Time noted at 3:12 p.m.; jury entered
18 courtroom.)

19 THE COURT: This note from the jury would
20 be "Court Exhibit 3".

21 THE CLERK: Note from the jury marked
22 "Court Exhibit 3".

23 THE COURT: May the record indicate I re-
24 ceived a note from this jury which the Court has marked
25 "Court Exhibit No. 3", which states as follows:

4.52

1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF NEW YORK

4 -----x
5 UNITED STATES OF AMERICA, :

6 Plaintiff, :

7 -against- :

8 JOE LOUIS JOHNSON, :

9 Defendant. :

10 -----x

11
12 United states Courthouse
13 Westbury, L.I., N.Y.

14 December 11, 1972
10:20 a.m.

15
16 Before :
17 HON. ANTHONY J. TRAVIA, U.S.D.J.

18
19
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21
22
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24
25
12.

GERALD I. METZ, CSR
Acting Official Court Reporter

1
2 THE COURT: U.S.A. against Johnson for
3 sentencing.

4 MR. SALAWAY: Your Honor, prior to sen-
5 tence on this matter, Agent Ryan stated he would
6 be here. He said that to Mr. Joe L. Johnson.
7 I wonder, your Honor, if I could have about a
8 fifteen-minute second call to see if he would
9 come.

10 THE COURT: Sure.

11 Me. Baker, would you make an attempt to
12 locate Agent Ryan, see if he is on his way here
13 so that we will know.

14 MR. BAKER: Right.

15 (A recess was taken.)

16 THE COURT: Mr. Salaway, did you hear
17 from Mr. Ryan?

18 MR. BAKER: We spoke to Detective Ryan.

19 THE COURT: Is he coming in.

20 MR. BAKER: No. We felt there is no
21 need for him to come in.

22 MR. SALAWAY: It was on the question
23 of whatever possible cooperation the defendant
24 had made. Detective Ryan stated he would come
25 in at least to the defendant. In my conversation

1
2 with him, he said that he would be able to come
3 in in an hour. But the question was would it be
4 of any value and would it be worth holding up
5 the Court.

6 THE COURT: I think at the time when we
7 were discussing whether or not this defendant
8 should be released on bail pending sentence that
9 was gone into, and I assume that Mr. Johnson has,
10 to whatever extent possible, been cooperative
11 with Agent Ryan. For Agent Ryan to now come in
12 today, I don't imagine there is very much he
13 could tell the Court.

14 MR. SALAWAY: He was working 12 to 8. I
15 don't know if he worked it last night. I know
16 from what the defendant told me, he said he
17 would be here.

18 When I spoke to Agent Ryan, he stated he
19 could be here within an hour.

20 THE COURT: You mean now?

21 MR. SALAWAY: Yes. This was a few moments
22 ago. The question was, would it be worth anything.
23 I do say this.

24 THE COURT: That's up to you. Did you talk
25 to Ryan?

2 MR. SALAWAY: Yes, I did.

3 THE COURT: What did he say, what did he
4 tell you, would it be of any value for me to wait?

5 MR. SALAWAY: He wanted to come in
6 within the hour.

7 MR. BAKER: Your Honor, I wish to correct
8 that. He did not say that. He said he would
9 come in if he was really needed, but he didn't
10 feel that it would do any good. In other words,
11 he left it up to us whether he was needed, and
12 I don't feel it would do any good on the basis
13 of what he told me. The defendant's attorney
14 is making some sort of representation that he
15 wanted to come in and I kept him away. That is
not correct.

17 THE COURT: I don't think Mr. Salaway is
18 saying that at all and I wouldn't let him say
that.

20 MR. SALAWAY: I have spoken to Detective
21 Ryan in the past on this matter and he has not
22 been as happy with the cooperation as he could
have been. But I would say --

24 THE COURT: I assume that's the reason
25 for not coming here, because if he had something

1
2 to add and something that might in any way be
3 persuasive in making a decision here, he would
4 be here, I am sure, and that's why I asked you
5 did he tell you anything when you spoke to him
6 this morning on the telephone which would indicate
7 that if he came here, he would be making any
8 recommendation other than what he has previously
9 told me.

10 MR. BAKER: The answer is no from what he
11 told me.

12 MR. SALAWAY: I have spoken to him prior
13 to today and he did say to me that the cooperation
14 in the way of narcotics has not been what he
15 expected from the defendant. But I do know
16 this for a fact, and I wanted Detective Ryan to
17 state it to the Court, that there was a homicide
18 that had been committed in Brooklyn a short time
19 ago and that Joe L. Johnson was instrumental in
20 having this person apprehended. He didn't
21 solve the crime, but he did tell the agents
22 where the person could be found, and the individual
23 did come in and was brought in by attorneys.

24 THE COURT: Didn't you tell me this before?

25 MR. SALAWAY: I don't think so. This

1
2 just happened about two weeks ago, your Honor.
3 So I don't think I could have mentioned it to
4 your Honor.

5 THE COURT: There was something similar
6 to that that was brought to my attention on
7 another sentence.

8 MR. SALAWAY: It must have been because
9 this just happened maybe two weeks ago.

10 THE COURT: But that is, of course, not
11 what Detective Ryan was driving at when he was
12 talking about sentencing here.

13 MR. SALAWAY: I would agree.

14 THE COURT: He was talking about the
15 possible cooperation with regard to the field
16 of narcotics without pinpointing it on any
17 particular area.

18 MR. SALAWAY: The problem I have at this
19 point is that the detective says that he has
20 assisted. Now, in what ways, I don't think the
21 ways that the agent had completely wanted.

22 THE COURT: From what he told you, he said no.

23 MR. SALAWAY: He said not complete
24 cooperation. I wish that at least Detective
25 Ryan would have stated what cooperation. If

2 your Honor felt it deserved any type of consid-
3 eration, at least we would have had it from him.
4 That's the dilemma at this point this morning.

5 THE COURT: I can do this because I am
6 not going to delay the sentencing because it's
7 apparent from what you say and what Mr. Baker
8 said that Detective Ryan is not here obviously
9 because he's not satisfied, to use your words,
10 with the cooperation that he has tendered
11 till now.

12 MR. SALAWAY: That's correct, that was

14 THE COURT: So that would be a big fat
15 zero if he did come in to tell me that, but what
16 I will do is after sentencing today, if you wish,
17 you have a right to talk to Detective Ryan and
18 if you feel that there is something that might
19 in any way be of some value to the Court, you can
20 always move under Rule 35 to reduce the sentence,
21 if necessary.

22 MR. SALAWAY: Fine, sir.

22 THE COURT: Then let's proceed.

24 Mr. Johnson, you are the defendant named
25 in the indictment contained in file 70 CR 768?

1
2 come to that part of it. But is there any legal
3 reason why judgment should not now be pronounced?

4 MR. SALAWAY: No, there is no legal reason.

5 THE COURT: Do you have any comments with
6 respect to what the sentence should be or what
7 the terms and conditions of the sentence should be?

8 MR. SALAWAY: Your Honor has a complete
9 probation report there. Your Honor paid a great
10 deal of attention to the trial and heard the
11 defendant on the stand and understands the
12 defendant's background. I don't minimize
13 what he's done, of course not, your Honor. It's
14 a very, very serious charge, and the man must
15 pay a penalty for those charges, but I ask the
16 Court to take the defendant's background into
17 consideration, the defendant's education into
18 consideration, the fact that he was a narcotics
19 addict, which is set forth in the report, the
20 fact that he lived in a section where, although
21 the acts were, of course, wrong and each one in
22 the community knows they are wrong, yet individuals
23 find themselves with the inability to make
24 money the way they feel they should make it,
25 watching other people in the streets and seeing

1
2 other things happening and seeing people driving
3 nice cars and having certain luxuries, and
4 unfortunately this man, as other men have found,
5 had fallen into the trap of committing these
6 dastardly acts in selling drugs.

7 This defendant is wrong for that and
8 should pay a penalty for it, your Honor, but I
9 ask you, your Honor, to temper the punishment
10 with the fact that the defendant's background
11 and his education and all the circumstances
12 involved -- I believe that this man can be
13 rehabilitated in jail. I think he can change
14 his lot. He has five children. He has a wife.
15 These were the most paramount things in his
16 life and important in his life. I believe
17 that he must go to jail, but I do not believe
18 it should be for such a long period of time,
19 your Honor, that when he gets out his children
20 will be full-grown, his wife will be elderly.
21 I believe a shorter period of time in jail will
22 be enough to rehabilitate this man where he
23 can come out and be a useful citizen in the
24 community.

25 I know that on a charge like this, your

1
2 Honor, there can be and there is, if I am not
3 mistaken, under law, a mandatory probationary
4 period even after he's released from jail.

5 THE COURT: No. That's under the old
6 law, 173, 174; no probation, no parole;
7 minimum five, maximum twenty years.

8 MR. SALAWAY: That is, I understand, the
9 minimum five. I understand there is no provision
10 of the special probation. I know there is the
11 mandatory-minimum in this. The defendant knows
12 that. The defendant knows that he must be
13 incarcerated.

14 I just ask, your Honor, based on his
15 entire background -- and the report I think
16 brings out his entire background quite well,
17 his family life, his background, how he got
18 into drugs and probably in the period from '68,
19 '69 on he didn't have any drug arrests, prior
20 to this particular matter and he did have one
21 after. It showed the man didn't learn his
22 lesson. There is no two ways about it. I do
23 know this, that in talking to the man, he
24 realizes he must go to jail and pay a penalty
25 and he realizes by committing these acts, he's

1
2 put his family in jeopardy and his children in
3 jeopardy and that he said to me -- if he hasn't
4 learned a lesson, he said, "I'm not going to do
5 this type of thing again," even during the
6 trial. "If I'm ever fortunate to win this case,"
7 not using those exact words, "If I ever win this
8 case, I'm never going to do that type of thing
9 again."

10 He denies ever possessing drugs, as I
11 see in the probation report, or selling drugs.
12 But my stating this, that he will never do it
13 again if the defendant denies his guilt, that
14 he will never put himself in that position again
15 where he could be arrested for this type of
16 charge, your Honor, I just wish the Court could
17 have as much leniency as possible, knowing that
18 this man again will be in society and that he
19 has five children and a wife. More than that
20 I cannot say.

21 THE COURT: Well, Mr. Salaway, it's been
22 my lot, of course, to have presided over this
23 trial of this case, and you recall that certain
24 efforts were made with regard to a plea here and
25 which he refused and he stood trial and

1
2 unfortunately for him, after a lengthy trial, and
3 I think a very fair trial, he was found guilty
4 by the jury unanimously, guilty of at least five
5 of the seven counts. He was found not guilty on
6 Counts 2 and 7 of the indictment and found
7 guilty on 1, 3, 4, 5 and 6, and of course those
8 were sales of heroin.

9 MR. SALAWAY: That is correct.

10 THE COURT: And it involved narcotics.
11 So that his denial, of course, was the basis
12 of the trial; he denied it, and the jury didn't
13 go along with him.

14 He also, according to what I find here,
15 has been off the drugs at least since 1969, so
16 that it would indicate that he knew what he was
17 doing then, and this occurred after he got off
18 drugs.

19 MR. SALAWAY: I think it was for the
20 profit motives, no doubt about it.

21 THE COURT: And that the motive could
22 only have been profit. In other words, what
23 he was suffering from before he learned his
24 lesson he was strong enough to get himself
25 off of it and then go into it for profit sake,

1
2 which is what I believe happens here, and you
3 know even though a lot of this record are things
4 I have not taken into consideration, it does
5 indicate, nevertheless, that he's been pretty
6 much involved with the law since he's been 16.
7 That's a long number of years, you know, from
8 16 to now, and he's 36. So it's over a twenty-year
9 period.

10 True, a lot of it doesn't amount to much
11 but, you know, when you pick out one or two of
12 the other things -- you got here assault with
13 intent to murder, for which he was sentenced
14 to ten years. That sentence, of course, was
15 suspended after a period of time, and then you
16 got a case which is pending presently in
17 Supreme Court for possession of drugs, which is
18 the one that happened after this arrest.

19 MR. SALAWAY: I would only say this as
20 to that; that it seems from reading the probation
21 report that there was that hiatus after he left
22 Mobile and went into the service where he was
23 honorably discharged, that he seemed to grow
24 up and become a little mature in his actions
25 and he stayed away from problems.

2 transporting of a weapon. I would only say to
3 the Court that I think that where this defendant
4 lived, how he lived created a lot of these
5 problems. It seems from my experience with many
6 of these defendants that have been brought up or
7 lived in Bedford-Stuyvesant that to them carry-
8 ing a gun -- and he was dismissed on that
9 charge and even by saying this or by alluding
10 to the fact -- assuming he even had the gun,
11 these defendants many times have these guns
12 because they are more afraid of the people in
13 the street than they are of anything else and
14 they would rather get stopped by a police man
15 with a gun, and I am not trying to explain it
16 or alibi it away. I am just saying how their
17 minds operate and their thinking.

18 THE COURT: To be frank with you, I
19 put a little checkmark in red on three of the
20 things that I thought were more important than
21 all of that, and there must be twenty of them
22 at least, charges, and I only picked three, the
23 assault with intent to murder, carrying a pistol
24 without a permit and possession of drugs, which
25 is after the one that he was involved in here,

1
2 I ask the Court to be as lenient as possible
3 so that this man can come back and put the pieces
4 of his life together and, hopefully, he will not
5 come back to commit crimes.

6 THE COURT: Mr. Johnson, is there any
7 reason why judgment should not now be pronounced
8 against you?

9 THE DEFENDANT: No, your Honor.

10 THE COURT: Do you have anything else to
11 say for yourself, any comments to make with
12 respect to what the sentence should be in
13 addition to what Mr. Salaway has stated?

14 THE DEFENDANT: No, your Honor.

15 THE COURT: Mr. Baker?

16 MR. BAKER: The government has no recom-
17 mendation.

18 THE COURT: Does the Probation Department
19 have anything to add?

20 MR. SHEEHAN: No.

21 THE COURT: You will note on your first
22 page the docket number is 70 CR 768 instead of
23 72 CR.

24 MR. SHEEHAN: I will change that.

25 THE COURT: Mr. Johnson, after a trial in

1
2 this case, the jury found you guilty of Counts 1,
3 3, 4, 5 and 6 of the indictment and found you not
4 guilty on Counts 2 and 7 as charged in the indict-
5 ment. Therefore, on the verdict of guilty, you
6 are committed to the custody of the Attorney-
7 General of the United States or his duly authorized
8 representative, who shall designate the place of
9 confinement for a term of 15 years on Count 1,
10 15 years on Count 3, 15 years on Count 4, 15 years
11 on Count 6, the sentence imposed on Counts 3, 4
12 and 6 to run concurrent with the sentence imposed
13 on Count 1, and on Count 5 the Court imposes a
14 sentence of ten years to run concurrent with the
15 sentence imposed on Count 1.

16 Now, Mr. Johnson, under Rule 32 of our
17 rules, you are to be notified of your right to
18 appeal. You have a right to appeal, and you
19 have a retained attorney. I trust you will
20 continue in his behalf, Mr. Salaway.

21 MR. SALAWAY: That is correct.

22 THE COURT: Mr. Johnson, I must say that
23 if you cannot afford to prosecute the appeal,
24 the Court will or ask Mr. Salaway to make a
25 motion to have you represented by counsel to be

1
2 appointed by the Court, to represent you in forma
3 pauperis and also to have your Notice of Appeal
4 filed immediately and in forma pauperis.

5 Do you want to file a Notice of Appeal
6 yourself?

7 MR. SALAWAY: Yes. I will file a Notice
8 of Appeal.

9 THE COURT: And if there is any question
10 about his not being able to prosecute his appeal,
11 you know what to do.

12 MR. SALAWAY: I will make the proper
13 application.

14 THE COURT: On the basis of what has
15 happened in the case before me, I think he can
16 retain you to continue your efforts.

17 MR. SALAWAY: He can retain me to con-
18 tinue. The only thing I am going to do is make
19 the application in the Second Circuit that we
20 can do it on typewritten briefs.

21 THE COURT: I am sure the Circuit Court
22 will permit that. They have done that regularly
23 in these cases.

24 MR. SALAWAY: Just one other matter.

25 The defendant requested me to ask you,

1
2 wishes this appeal to be prosecuted as quickly
3 as possible.

4 THE COURT: With all due respect to you,
5 you tried an excellent case here. I think you
6 did a very fine job, an exemplary job. I want
7 you to know that. A lot of lawyers come before
8 me, and I think Mr. Salaway exemplified what I
9 would say was an excellent lawyer and did an
10 excellent job for you. But I must with all due
11 respect to you, Mr. Salaway, say that there is
12 very little likelihood in a change on an appeal
13 in this case. I think there is going to be
14 very little chance of a reversal and that, too,
15 should also be considered by me in whether or not
16 I consider a chance to let him out pending
17 appeal.

18 If there was a fair chance of reversal,
19 I would consider it again as to whether or not
20 I should let him out pending appeal, but I just
21 don't see it. So I can add that to one of the
22 reasons why I must refuse.

23 Your man, Mr. Marshal. Sorry.

24 Is there somebody from his family he
25 wants to see?

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BRONX, NEW YORK x

JOE L. JOHNSON
Petitioner

CIVIL ACTION NUMBER

vs.

UNITED STATES OF AMERICA,
Respondent x

MOTION TO VACATE SENTENCE

Comes now Joe L. Johnson, Petitioner in the above entitled cause, and moves this Court pursuant to Title 28 U.S.C. Annotated, § 2255 to vacate his Judgment and sentence issued on December 11, 1972 in Indictment No. 70 Cr 768 in this Court, and respectfully shows the court as follows:

- 1 -

Petitioner is presently in Federal custody in the United States Penitentiary, Atlanta, Georgia serving a term of Fifteen (15) years sentence as handed down on December 11, 1972 in indictment No. 70 CR 768

- 2 -

Petitioner submits that the conviction and sentence afore mentioned are invalid, null and void.

- 3 -

The afore-mentioned conviction and sentence are invalid and void in that it was issued in violation of the petitioners rights under the fifth, sixth and fourteenth Amendment to the United States Constitution, in that:

(a) Petitioner was denied his Constitutional right to a speedy trial as guaranteed him under the Sixth Amendment to the Constitution

(b) That his counsel acted in a manner that deprived this petitioner the effective assistance of counsel (see attached affidavit).

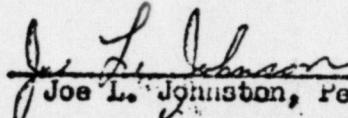
- 4 -

That the records and files in the Indictment No. 70 CR 768 do no conclusively show that this petitioner is not entitled to relief, and that he is entitled to the relief of an Evidentiary Hearing

WHEREFORE, Petitioner respectfully prays that this Court ORDER the Government to show cause on a date certain, why petitioner's motion should not be granted, thereby granting a prompt hearing in order that the Court may determine the issues and make findings of fact and conclusions of law in respect thereto. Further that the Government be ORDERED, to produce the Petitioner at the above mentioned Hearing so that he may be of assistance to his counsel at said Hearing.

Respectfully submitted this 30 day of

August 1974.


Joe L. Johnston, Petitioner

STATE OF GEORGIA)

: ss

COUNTY OF FULTON)

SWORN TO AND SUBSCRIBED BEFORE ME THIS

SEP 3 1974

Parole Officer: Authorized by the Act of
July 7, 1955 to Administer Oaths (18 U.S.C.
4004).

DAY OF

1974.


Parole Officer

L.:BJF:cya
F.4703631

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

JOE L. JOHNSON,

Petitioner,

- vs -

UNITED STATES OF AMERICA.

Respondant.

----- X

STATE OF NEW YORK)
COUNTY OF KINGS) SS:
EASTERN DISTRICT OF NEW YORK)

AFFIDAVIT
IN OPPOSITION

74 C 1304

BERNARD J. FRIED, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney for the Eastern District of New York and Chief of the Narcotics Section. I make this affidavit in opposition to the motion of the petitioner, JOE L. JOHNSON to have his conviction set aside pursuant to Title 28, United States Code, Section 2255.

2. On November 5, 1970, a Grand Jury sitting within this District handed up a seven count indictment charging petitioner with various heroin-related offenses.

3. In October 1972, following a four day jury trial petitioner was convicted on five counts of the indictment and acquitted on two counts. He was sentenced to a prison term of fifteen years on counts one, three, four and six and to a ten year term on count five. All sentences imposed were to run concurrently with that imposed on count one.

4. On April 6, 1973, following oral argument, the Court of Appeals for the Second Circuit affirmed petitioner's conviction from the bench. The issues presented on direct appeal were: (a) whether petitioner had been denied his Sixth Amendment right to a Speedy Trial as required by the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, (b) a search and seizure issue and (c) the correctness of this Court's denial of a severance motion. All three issues were thoroughly treated on the direct appeal, including the Speedy Trial question which petitioner appears to be seeking to relitigate on this motion.

(Apparently, petitioner recognized that he cannot do so inasmuch as his affidavit does not mention it. Rather, the accompanying briefs sets this issue in the context of his claim to have been deprived of the effective assistance of counsel.)

5. There is nothing in the records of this Office or in the Office of the United States Attorney for the Southern District of New York to indicate that in 1972 at the time of petitioner's trial his attorney Kenneth Sallaway, was under investigation for "fixing cases" as alleged by petitioner in his affidavit. Furthermore, there are no known tape recordings concerning Mr. Sallaway's alleged activities. Petitioner has made bald allegations completely unsupported in fact.

6. Petitioner incorrectly alleges that the Honorable Anthony J. Travia was a witness in a related case entitled "U. S. v. Bottom" and that Mr. Sallaway was a defense attorney in that case. No such case has been located in either this District or the Southern District of New York. Judge Travia is not known to have testified

in any such case. However, in United States v. Bynum, 475 F.2d 832 (2nd Cir. 1973), Judge Travia had issued an order authorizing electronic surveillance and testified concerning this order.

7. It is the Government's position, as supported by the accompanying memorandum of law, that this motion is frivolous and that it should be denied without a hearing.

WHEREFORE, your deponent respectfully requests that the petitioner's motion to have his conviction set aside be denied.

BERNARD J. FRIED
Assistant U. S. Attorney
Chief, Narcotics Section

Sworn to before me this
25th day of October 1974.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN, NEW YORK

JOE L. JOHNSON,
Petitioner

vs.

AFFIDAVIT

Civil Action

UNITED STATES OF AMERICA
Respondent

STATE OF GEORGIA)
: ss
COUNTY OF FULTON)

JOE L. JOHNSON, who, after being duly sworn, according to law, on oath deposes and says:

That he is a citizen of the United States of legal age, and;

That he makes this statement with the full knowledge of the penalties for false swearing under oath.

That he is the defendant in 70-CR 768 and the petitioner in the attached motion to vacate sentence.

That his attorney, Kenneth Sallaway, Esq., was under investigation for fixing cases at the time of petitioner's trial.

That in the investigation conducted in the course of the inquiry into petitioner's counsel's activity certain tape recordings were divulged.

That the Honorable Anthony J. Travia, United States District Judge had heard the tape recordings prior to sitting on the instant cause.

That Judge Travia was a witness in an related case (UNITED STATES OF AMERICA vs. BOTTOM), related to the extent that Attorney Sallaway represented defendant's in the Bottom case.

That at the sentencing the petitioner's attorney stated that the defendant was in the narcotics business for the profit "no doubt about it" but that he was sorry for it". This statement was erroneous and untrue.

That petitioner/ affiant states that he was deprived due process of law

Further Affiant sayeth not:

Joe L. Johnson
Joe L. Johnson, Affiant

SWORN AND SUBSCRIBED BEFORE
ME, THIS _____ day of

1974.

SEP 3 1974

Parole Officer

Parole Officer: Authorized by the Act on
July 7, 1955 to Administer Oaths (2 U.S.C.
4004).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORKIN CLERK'S OFFICE
U. S. DISTRICT COURT E. D. N. Y.

NOV 1-1974

JOE L. JOHNSON,

TIME A.M.
P.M.

Petitioner, :

74-C-1304

-against-

: DECISION AND ORDER

UNITED STATES OF AMERICA,

:

Respondent. :

November 1, 1974

TRAVIA, D. J.

Petitioner moves for an order pursuant to Title 28 U.S.C. § 2255 setting aside his judgment of conviction and sentence. In support of his application, the petitioner avers:

(1) That the petitioner was denied his Constitutional right to a speedy trial; and

(2) that the petitioner was not afforded the effective assistance of counsel.

On November 5, 1970, a Grand Jury sitting within the Eastern District of New York handed up a seven count indictment charging the petitioner with various heroin-related offenses. Thereafter, in October 1972, the petitioner was convicted, after a jury trial, on five counts of the indictment. The petitioner was then sentenced on December 11, 1972

to a term of fifteen years in prison.

The petitioner took an appeal from his judgment of conviction and raised, among other things, the same issue of denial of his Sixth Amendment right to a speedy trial as is presented in the § 2255 motion at bar. On April 6, 1973, the

Court of Appeals for this Circuit affirmed the petitioner's conviction and thereby tacitly found the petitioner's speedy trial argument to be without merit. Consequently, this issue

^{/1}
need not detain us here. See, e.g., Meyers v. United States,
446 F.2d 37 (2d Cir. 1971).

The petitioner's claim of ineffective assistance of counsel is also infirm. The standard for demonstrating ineffective assistance of counsel in this Circuit is a stringent

/1 However, it should be noted that in certain circumstances, a district court may entertain a § 2255 motion even though an appeal was taken from the original conviction. For example, where it is unclear whether the issue presented to the district court was raised on appeal or whether the appellate court's decision was on the merits, the district court may hear the matter in order to make sure that the petitioner has been afforded one adequate litigation. See Kaufman v. United States, 394 U.S. 217, 230-231 (1969). Here, in contrast to the situation envisioned by the Supreme Court in Kaufman, the petitioner's speedy trial claim has been presented to the appellate court and a decision was rendered on the merits. As a result, relitigation of this issue at the district court level is inappropriate.

3.

one. As stated in United States ex rel. Crispin v. Mancusi, 443 F.2d 233, 237 (2d Cir. 1971):

"To be entitled to relief, petitioner must show that 'the purported representation by counsel was such as to make the trial a farce and a mockery of justice,' representation that is so deficient as 'to shock the conscience of the Court.'" (Citations omitted).

The petitioner points to several alleged irregularities which he claims deprived him of the effective assistance of counsel. First, the petitioner maintains that his attorney, Kenneth Sallaway, Esq., was under investigation for fixing cases at the time of the petitioner's trial. Even assuming that this allegation is true, it is difficult to conceive how such a set of circumstances could have deprived the petitioner of the effective assistance of counsel in a totally unrelated case. Secondly, the petitioner contends that during the course of the aforementioned investigation, tape recordings were made which the court listened to prior to sitting on the petitioner's case. The court listened to no such tape recordings. Thirdly, it is the petitioner's position that he was prejudiced by the fact that the court testified in United States v. Bynum, 360 F.Supp. 400 (S.D.N.Y.1973)

/2

/2 The related historical citations of the United States v. Bynum, 360 F.Supp. 400 (S.D.N.Y. 1973), case have been omitted as the merits of Bynum are not applicable to the instant § 2255 motion.

a case in which the petitioner's attorney was a defense counsel. While it is true that the court testified in Bynum and that the petitioner's attorney was a defense counsel, it is difficult for the court to understand how events surrounding the Bynum case have anything to do with the effectiveness of counsel's representation in a completely different and unrelated criminal action. Lastly, at the time of sentencing, the petitioner's attorney related to the court that the defendant was in the narcotics business for profit but that he was sorry for it. The petitioner now claims that this statement was erroneous and untrue. As the Government correctly points out in its opposing papers, the fact that such a representation was made to the court can, at best, only be characterized as a mistaken choice of strategy, the wisdom of which cannot be scrutinized by this court. United States v. Gonzalez, 321 F.2d 638, 639 (2d Cir. 1963).

In sum, the record and files in this matter conclusively show that the petitioner is not entitled to relief and therefore no hearing is necessary. Hodges v. United States, 368 U.S. 139 (1961).

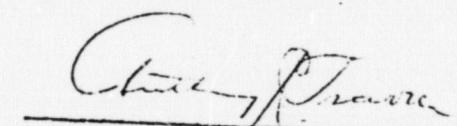
Accordingly, it is

ORDERED that the petitioner's application to set aside his judgment of conviction and sentence pursuant to

5.

Title 28 U.S.C. § 2255 is denied.

The Clerk of the Court is directed to send a copy
of this Decision and Order to the petitioner.



U. S. D. J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

JOE L. JOHNSON,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent.

CIVIL ACTION NO. 74 - C - 1304

PETITION FOR RE-HEARING

This petition is directed to the Honorable Chief Judge Jacob Mishler:

Petitioner, JOE L. JOHNSON, petitions this Court for a re-hearing on the above entitled cause pursuant to the decision and ORDER entered on November 1, 1974 denying petitioner's Motion to Vacate Conviction and Sentence and in support says that:

(1) This Court was prejudicial in the handling of this case because of prior information obtained against the petitioner from listening to tape recordings while preparing to be a witness in the Bynum Case, supra, and it is necessary to produce the testimony given by Judge Travia in the Bynum Case to determine if any prejudice to the petitioner lies.

It is further necessary that Judge Travia be sequestered from this action so that he can be called as a witness in this proceeding.

The contentions raised herein compels this Court to weigh the answers in compliance with the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. These Amendments insist that Due Process and Equal Protection of law be guaranteed and safeguarded and the right to trial by jury and the right to effective assistance of counsel should not be diluted or negated by the trial Court. Wherefore, Petitioner insists that those guarantees having been violated makes this motion cognizable pursuant to KAUFMAN -v- UNITED STATES, 394 U.S. 217 (1969); SANDERS -v- U.S., 373, U.S. 1, (1963); FAY -v- NOIA, 372 U.S. 293 (1963); U. S. -v- HAYMAN, 342 U.S. 205 (1952) and TOMSEED -v- SAIN, 372 U.S. 293 (1963) wherein an evidentiary hearing should be held.

Trial Judge, on pages 3 and 4 of the decision, denying relief, states that the Bynum Case is unrelated and the merits of Bynum are not applicable to the instant 2255 Motion, however it is a fact by the Trial Judge's own admission, he did testify in the Bynum Case and gave testimony concerning the tapes, which tapes concerned illegal trafficking in heroin. Wherein, said tapes the petitioner's name was mentioned allegedly in connection with sales of heroin. This hearing of the tapes took place prior to petitioner's trial and for the trial Judge to omit the merits of the Bynum Case without more compels the Government to place this motion before another Judge for an evidentiary hearing.

By the trial Judge hearing the petitioner's name mentioned on tapes concerning heroin prior to petitioner's trial was prejudicial and caused a denial of the right to a fair and impartial trial.

(A) Trial Judge denied petitioner a fair and impartial trial with malice and forethought against the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

(B) And denied petitioner the right to have the jury bring in a verdict without trial Judge invading the province of the jury.

(C) And that trial Judge was in collusion with defense counsel and prosecutor and did suppress vital defense evidence;

(D) And that trial counsel did deny petitioner the right to effective assistance of counsel in that;

(E) Counsel was in collusion with trial Judge and prosecutor and did suppress vital defense evidence which denied effective assistance;

(F) AND after counsel was dismissed by petitioner, he did enter a frivolous brief on appeal without consent of, or informing petitioner of said action.

(G) And that counsel denied petitioner the right to counsel-client relations by not informing, or contacting petitioner of his action.

Petitioner requests this Court to ORDER that trial counsel be summoned at this hearing to give testimony concerning the evidence that was suppressed by him, which evidence was no doubt favorable to defense and to explain why, after petitioner had dispensed with his services, prior to appeal, he continued to represent petitioner and filed the appeal without informing petitioner that he was so doing, which denied petitioner his rights according to ANDERS -v- CALIFORNIA, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 2d 493 (1967) and further to give testimony

concerning the Bynum Case and the connection of the Bynum Case with petitioner's case which connection denied petitioner a fair and impartial trial by trial Judge. Petitioner further requests the prosecutor be summoned to give testimony concerning the evidence trial counsel promised not to use against him. See: "Trial Transcript of Petitioner's Testimony" which promise was collusion and denied petitioner a fair trial.

WHEREFORE, for all the herein cited reasons and the reasons and facts cited in the original motion, together with the attached memorandum, the petitioner PRAYS that this Court will grant a re-hearing of his motion to vacate conviction and sentence and ORDER that an evidentiary hearing be had in this matter forthwith.

Respectfully submitted,

Joe L. Johnson
JOE L. JOHNSON, Petitioner
Box PIB - 71274-153
Atlanta, Georgia 30315

Sworn to and subscribed before me this 3rd day of December, 1974.

J. B. Skaggs
Parole Officer

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK----- X
JOE L. JOHNSON,

Petitioner,

v.

74-C-1304

MEMORANDUM and
ORDER-----
UNITED STATES OF AMERICA,

Respondent.

DEC. 10, 1974

----- X
COSTANTINO, D.J.

On November 1, 1974, Judge Travia denied the petitioner's motion to vacate his sentence. Petitioner now moves to have his application reheard or in the alternative for leave to proceed on appeal in forma pauperis.

Upon a review of Judge Travia's decision the application for a rehearing is denied.

Leave to proceed on appeal in forma pauperis is granted.

So Ordered.

/s/
U. S. D. J.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

two copies

That on the 23rd day of July 19 75 he served ~~a copy~~ of the within

Government's Appendix

by placing the same in a properly postpaid franked envelope addressed to:

Mr. Joe L. Johnson
c/o U. S. Penitentiary, Box PMB
Atlanta, Georgia 30315

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this

23rd day of July 19 75

Olga S. Morgan

OLGA S. MORGAN
Notary Public State of New York

Reg. No. 24-4501966

Qualified in Kings County

Commission Expires March 30, 1977



